

# DECISION



28164

THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-213682.2

DATE: May 2, 1984

MATTER OF: Information Consultants, Inc.--Request for  
Reconsideration

## DIGEST:

1. GAO decision dismissing a potential subcontractor's protest against a subcontract award is affirmed where, upon request for reconsideration, the protester fails to demonstrate that the contracting agency acted fraudulently or in bad faith in approving the subcontract.
2. GAO has no authority under the Freedom of Information Act to determine what information government agencies must disclose.

Information Consultants, Inc. (ICI) requests reconsideration of our decision Information Consultants, Inc., B-213682, April 2, 1984, 84-1 CPD \_\_\_\_, in which we dismissed ICI's protest because we determined that it did not meet any of the limited circumstances under which we review subcontractor protests.

We affirm the dismissal of ICI's protest.

The protest concerned a proposed subcontract award by an Environmental Protection Agency (EPA) prime contractor, Fein-Marquart Associates, Inc. (FMA), to American Management Services (AMS) for teleprocessing services. In our decision, we dismissed as premature that portion of ICI's protest in which the firm alleged that EPA's approval of the subcontract would amount to fraud or bad faith, since we had not at that point been advised that EPA had approved the subcontract.

ICI's reconsideration request is based on the fact that EPA has now approved the subcontract. ICI alleges that, in doing so, EPA acted in bad faith and thus, the firm argues, its protest falls within those limited circumstances in which we review the award of a subcontract. Specifically, ICI asserts that EPA willfully disregarded the illegal provisions of the subcontract and the unfair aspects of the selection procedures, in that the agency:

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1. either approved the subcontract with an illegal cost-plus-a-percentage-of-cost pricing provision proposed by AMS intact, or sanctioned AMS's revision of that provision without affording ICI a similar opportunity to revise its prices;
2. ignored the fact that FMA proposed award to AMS only 2 days after the closing date for receipt of proposals, having only negotiated with AMS; and
3. approved the AMS subcontract despite ICI's allegation in its initial protest that similarities in typeface between AMS's proposed prices and FMA's subcontract form demonstrated probable collusion between the two firms.

ICI also noted that, even though EPA gave ICI a copy of an early version of the proposed subcontract, the agency has unreasonably refused to provide the firm with a copy of the approved subcontract.

This Office will review the award of a subcontract where a protester demonstrates the possibility that government approval of the subcontract resulted from fraud or bad faith. 51 Comp. Gen. 803 (1972). To support a finding of bad faith, the record must show that the government had a malicious and injurious intent. See Ecological Research Services, Inc., B-209358, April 22, 1983, 83-1 CPD 442.

We do not believe the record in this case supports a finding that EPA acted fraudulently or in bad faith. First, our examination of the approved subcontract shows that the cost-plus-a-percentage-of-cost pricing provision was removed and we find nothing else in the subcontract that would appear to be prejudicial to the government's interests.

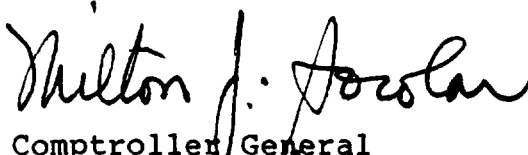
In addition, there is no evidence here of any injurious or malicious intent on EPA's part. In this regard, ICI asserts that EPA had an obligation to ensure that FMA's selection of a subcontractor was fair and unbiased. Since

EPA approved the subcontract in the face of ICI's protest showing irregularities in the procurement, ICI contends, EPA willfully disregarded the facts and that such action was tantamount to bad faith.

We disagree. Under its contract with FMA, EPA had no affirmative responsibilities concerning the selection of a subcontractor, but instead was merely obligated, in essence, to ensure that FMA supplied teleprocessing services at a reasonable price. The responsibility for selection clearly rested with FMA, an independent contractor. While ICI takes issue with the manner in which FMA carried out its responsibility, there is no evidence here that EPA was involved in the selection, nor do we believe that EPA was obliged to become involved where the subcontract presented for approval, with minor modifications, met the government's needs. We conclude therefore that EPA did not act fraudulently or in bad faith in approving the subcontract.\*

ICI contends that EPA has unreasonably refused to release to it a copy of the approved subcontract. EPA informally advises us that ICI has filed a request for that information under the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq. (1982). Our Office has no authority under FOIA to determine what information government agencies must disclose and thus ICI's sole recourse is to pursue the remedies provided under that Act. See Surgical Instrument Company of America, B-212653, November 30, 1983, 83-2 CPD 628.

Our decision is affirmed.

  
Acting Comptroller General  
of the United States

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\*We note that, while ICI cites language from our decision Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166, in support of its position, we determined in that case, based on circumstances and allegations similar to those here, that agency approval of a subcontract did not result from fraud or bad faith.